

because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial" (See also Halsbury's Laws of England, 4th Edition, Volume I, page 281, para. 440).

It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied. From the reasons given by the learned judge in allowing the appeal in the present case it was clear that he had exercised his discretion in accordance with the well-established and recognized principles. We were therefore satisfied that he was right in allowing the appeal.

For the reasons stated we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Jayaraman & Ong.*

**ANDREW s/o THAMBOOSAMY v.
SUPERINTENDENT OF PUDU PRISONS,
KUALA LUMPUR**

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) June 12, 1976]

[Kuala Lumpur — Federal Court Criminal Appeal No. 5 of 1976]

Administrative Law — Habeas corpus — Person detained under Immigration Ordinance — Arrangements for his removal not made because of non-cooperation of person detained — Whether detention unlawful — Whether there is right to be heard before making of order of detention — Service of detention order — Inability of authorities to remove the appellant from the Federation — Whether he may be released on bail — Immigration Ordinance, 1959, ss. 6(1)(c), 34(1) and 56(2) — Criminal Procedure Code (F.M.S. Cap. 6), s. 365.

Bail — Person detained under Immigration Ordinance.

The appellant had renounced his citizenship and had returned to India. Subsequently he re-entered the Federation and he was detained under section 34(1) of the Immigration Ordinance, 1959, so that arrangements could be made for his removal. The appellant refused to co-operate with the authorities to enable travel documents to be issued to him and therefore he could not be deported. He applied for an order of *habeas corpus*, claiming that his detention was illegal or improper. His application was dismissed in the High Court and he appealed to the Federal Court.

Held, dismissing the appeal: (1) as the Immigration Ordinance did not give a right to a hearing before an order of detention is issued, the appellant had no such right, implied or otherwise;

(2) as the Ordinance did not require the order of detention to be served on the appellant, it need not have been served as a matter of law. In this case however there was evidence that it was served on the appellant;

(3) the appellant was lawfully detained in this case and the fact that the authorities were unable to remove the appellant from the Federation did not make the detention illegal or unlawful;

(4) the court had no power under section 365 of the Criminal Procedure Code to give bail, to the appellant.

A Cases referred to:—

- (1) *Lui Ah Yong alias Loi Tuan New v. Superintendent of Prisons, Penang*. Penang Originating Motion No. 22 of 1975 (unreported).
- (2) *Ceylon University v. Fernando* [1960] 1 W.L.R. 223.
- (3) *Durayappah v. Fernando* [1967] 2 A.C. 337.
- (4) *Zainab binti Othman v. Superintendent of Prison, Pulau Jerejah, Penang* [1975] 2 M.L.J. 221.
- (5) *Karam Singh v. Minister of Home Affairs* [1969] 2 M.L.J. 129.

B

FEDERAL COURT.

Lawrence Tan for the appellant.

Haji Abdullah Ngah (Deputy Public Prosecutor) for the respondent.

C

Suffian L.P. (delivering the judgment of the Court):
The issues in this appeal are:

- (1) was and is the appellant illegally or improperly detained, and
- (2) if he was and is, has the court power to release him on bail?

D

The appellant, born in Kuala Lumpur on February 27, 1939, was a Malaysian citizen. On February 5, 1969, he voluntarily renounced his Malaysian citizenship. The renunciation was registered by the Registrar-General of Citizenship on February 28. The appellant was informed of the registration on March 6. He had surrendered his national registration identity card for which a receipt dated February 25 was issued. As a result of his renunciation he ceased to be a citizen by virtue of article 23(1) of the Federal Constitution which reads:—

E

"23(1) Any citizen of or over the age of twenty-one years and of sound mind who is also or is about to become a citizen of another country may renounce his citizenship of the Federation by declaration registered by the Federal Government, and shall thereupon cease to be a citizen."

F

Following the renunciation, the appellant on March 24 applied to the Immigration Department for a certificate of identity to enable him to make a one-way trip to India. On April 17, he was granted a certificate of identity.

G

On July 22, he applied for the withdrawal of his E.P.F. contribution on the ground that he was leaving Malaysia in order to settle in India permanently. In support of his application the appellant told the Manager, E.P.F., Petaling Jaya, that he would be leaving Malaysia for India on August 5 by S.S. Rajula. His application was approved and he withdrew his E.P.F. money on August 4.

H

But in the meantime, on January 31 he had applied for a Malaysian passport. It was granted to him on the following day, that is 4 days before he renounced his citizenship. In his application for the passport he said that he wanted it so that he could make a social visit to India.

I

In August 1969, the appellant left Penang by boat for India.

He did not however stay long there, for in February 1970, he returned to Malaysia by air through Subang airport by making use of the Malaysian passport. As a non-Malaysian he should have had, but did not have, a Pass to enter the country as required

by section 6(1)(c) of the Immigration Ordinance No. 12 of 1959.

The appellant said that he had not surrendered the Malaysian passport when renouncing his citizenship because with it he could return to Malaysia.

Because the appellant had unlawfully entered the Federation when not in possession of a valid pass, on February 26, 1975, (i.e. after he had been back in Malaysia for five years) the Principal Assistant Director of Immigration, in exercise of power delegated to him, presumably by the Director, made two orders against the appellant, namely an order of removal under section 56(2) and an order of detention under section 34(1) of the Ordinance requiring the Penguasa Penjara Kanan, Pudu Prison, to detain the appellant "until such time as arrangements can be made for his removal from the Federation".

Section 56(2) provides:—

"(2) Any person unlawfully entering or re-entering... the Federation or unlawfully remaining in the Federation shall whether or not any proceedings are taken against him in respect of such offence be liable to be removed from the Federation by order of the Controller."

Section 34(1) provides:—

"34(1) Where any person is ordered to be removed from the Federation under the provisions of this Ordinance, it shall be lawful for the Controller to order such person to be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal."

On December 24, 1975, the appellant applied for an order of habeas corpus, claiming that his detention was illegal or improper.

When the learned trial judge first heard this application on January 19, 1976, he was informed that the Immigration Department had taken no steps to deport the appellant within the shortest time possible. The court then granted two weeks' adjournment.

On February 4, 1976, when the application came up again before the learned judge, he was informed that to deport the appellant, he must have travel documents, that the appellant had told the Immigration Department that he was not willing to leave Malaysia, that he refused to cooperate and that as a result the Immigration Department was unable to deport him. Through counsel, the appellant admitted that he would not sign any application for travel documents so that he could be deported. Not surprisingly the learned judge observed that what sympathy was felt for him evaporated with his intransigence and he dismissed the appellant's application.

The learned judge held that under section 365(i)(b) of the F.M.S. Criminal Procedure Code which reads:—

"The High Court may whenever it thinks fit direct... that any person who is alleged to be illegally or improperly detained in public custody within the limits of the Federation, be set at liberty."

there are only two matters for the court to consider. First is the question whether a person is illegally or improperly detained. If he is, then the court should set him at liberty; but if he is not, then the court has no power to set him at liberty, because the F.M.S. Criminal Procedure Code has no provision corresponding to section 394(a) of the S.S. Criminal Pro-

cedure Code (since repealed) under which the court may, whenever it thinks fit, order the person detained, admitted to bail, even though his detention is not unlawful. It was under that provision that Arulanandom J. ordered the applicant to be released on bail in *Lui Ah Yong alias Loi Tuan New v. Superintendent of Prisons, Penang*,⁽¹⁾ Penang Originating Motion No. 22 of 1975 (unreported).

The appellant in the instant case appealed to us.

His first ground of appeal was that though the Immigration Ordinance was silent as to procedure and gave no express right to a hearing, yet the appellant had an implied right to a hearing before the order of detention was issued and that his detention was unlawful because he was not given a hearing. His counsel relied on a passage in Prof. de Smith's *Judicial Review of Administration Action*, 3rd edition, page 154, on *Ceylon University v. Fernando*⁽²⁾ and on *Durayappah v. Fernando*.⁽³⁾ We are of the opinion that there is no merit in this ground. As the Ordinance does not give the appellant a right to a hearing before the order of detention was issued, he had no such right, implied or otherwise.

The second ground of appeal was that the detention was unlawful because the order of detention had never been served on the appellant. It was argued that though the Ordinance nowhere stated that the order of detention should be served on the appellant, nevertheless it should have been served, and for this proposition *Zainab binti Othman v. Superintendent of Prison, Pulau Jerejak, Penang*⁽⁴⁾ was relied on. We are of the opinion that as the Ordinance does not require the order of detention to be served on the appellant, it need not have been served as a matter of law. In any event, the Deputy Assistant Director of Immigration said that the order of detention had been served on the appellant.

We now come to the third ground, which was said to be the main ground of appeal, and that is that because the Immigration authorities were unable to remove the appellant from the Federation, his detention had been prolonged and indefinite and therefore unlawful. For this proposition learned counsel relied on the Penang case, *Lui Ah Yong*, already referred to.

In that case the applicant was the subject of an order of removal dated November 25, 1967, under section 56(2) and of an order of detention of the same date under section 34(1) of the Ordinance.

On December 1, 1975, over eight years later, he was still detained in prison because the Immigration Department was unable to find a country willing to accept him as a deportee. The learned judge, as already stated, released the appellant on bail, which he had power to do under section 394(a) of the S.S. Criminal Procedure Code.

In the course of his judgment he said that:

- (1) the power of detention given in section 34(1) is not intended to enable a person to be detained indefinitely in prison;
- (2) the order of removal under section 56(2) was a lawful order;

- (3) the order of detention consequential on the order of removal was a means to an end, namely to allow the applicant to be detained so that he might be removed from the Federation, and that it too was a lawful order;
- (4) but, though it was originally lawful in 1967, it ceased to be so in 1975 when the Immigration Department had found that the object of the detention could not be fulfilled (because no country would accept him as a deportee) and that therefore the continued detention of the applicant became unlawful; and
- (5) section 34(1) contemplates removal of the person affected from Malaysia within a reasonable time required for putting into effect the removal order and not for detaining a person indefinitely and arbitrarily.

With respect, we agree that any form of detention does violence to section 5(1) of the Constitution which reads:

"5(1) No person shall be deprived of his... personal liberty save in accordance with law."

and hence power given by law to detain must be construed strictly and in cases of doubt or ambiguity the court should lean in favour of the subject. Government is the most powerful body in the country and the court should be vigilant to see that Government does not exceed its power when dealing with individuals. But at the same time we are of the opinion that the problem of dealing with illegal immigrants is a matter of public policy to be decided by Parliament and by the Executive, that in this matter the proper authority for enacting the necessary legislation is Parliament and that if the Government exercises a power conferred on it by Parliament and keeps within the law, then the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on the immigrant. His remedy is then not judicial, but political and administrative.

As has been laid down in this court in *Karam Singh v. Minister of Home Affairs*⁽⁵⁾ when a person complains that he is being illegally or improperly detained, it is for the detaining authority to justify the detention. In the ordinary way, he would produce an order of detention. If the person who signed that order had power to do so and had before, when and after signing that order, complied with all conditions laid down by the law, then the order of detention which is authentic and made in good faith is a sufficient answer, and the court must hold the order and detention lawful — unless the detainee alleges and can prove *mala fides*. In the instant case the detaining authority had power to detain the appellant, he had complied with the law in every way and therefore the order of detention was perfectly valid.

We agree with Arulanandom J. that the order of detention under section 34(1) is made with a view to deporting the person detained but we do not agree that when it has been found by the Immigration Department that no country would accept the deportee, the detention then becomes unlawful. A valid deten-

tion order under section 34(1) in our opinion remains valid until revoked. Probably in the Penang case we too might have also released the applicant there on bail, not however on the grounds stated by the learned judge there, but simply because the applicant had been detained too long and in Penang the court had power to release a detainee on bail, even if he was not illegally or improperly detained.

In the case under appeal, the appellant through his counsel frankly stated that he was determined not to return to India, that he was determined to remain here, that he would like to be released on bail so that in due course he would qualify to apply for citizenship. The learned judge here held, and we respectfully agree with him, that the choice before the court was and is a simple one; if the appellant is illegally or improperly detained, he is to be set at liberty; but if on the other hand he is not so detained the court has no power under the F.M.S. Criminal Procedure Code to release him on bail and he should not be set at liberty.

Under the Immigration Ordinance, only the Executive has power to release the appellant. Whether or not the Executive should do so is a matter of policy for them. They have information and sources of information not available to the court and are moved by political, economic, social and cultural considerations which the court is not well equipped to apply, and judges should be slow to embarrass them into any course of action.

To sum up, our answers to the issues raised in this appeal are:

- (1) the appellant was not and is not illegally or improperly detained, and
- (2) the court operating under the F.M.S. Criminal Procedure Code has no power to release him on bail.

For the above reasons we dismissed this appeal.

Appeal dismissed.

Solicitors: *Lawrence, Tan & Co.*